NOTE: THE SUPPRESSION ORDERS MADE IN THE EMPLOYMENT COURT ON 4 JUNE 2014 REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA703/2014
[2016] NZCA 203

BETWEEN	ASG Appellant
AND	HARLENE HAYNE, VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Respondent

Hearing: 26 November 2015

Court: Harrison, Wild and Kós JJ

Counsel: P Cranney for Appellant
R E Harrison QC and B C Dorking for Respondent

Judgment: 16 May 2016 at 11 am

JUDGMENT OF THE COURT

A The questions for decision are answered as follows:

(1) Question: In interpreting s 200 of the Criminal Procedure Act 2011, did the Employment Court err at [47]–[49] of its judgment, in holding that, where an order forbidding publication of information has been made, it is not a "publication" to make disclosure of that information to that person's employer where the employer has a genuine interest in that information?
Answer: No.

(2) Question: If the answer to question (1) is Yes, was it nonetheless open to the employer, the Vice-Chancellor of the University of Otago, to rely on and use information obtained contrary to the order?
Answer: None required.

B The appellant must pay the respondent's costs for a standard appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This appeal concerns the ambit of the suppression of names provisions in the Criminal Procedure Act 2011, and in particular the ambit of an order made under s 200. Those parts of s 200 that are important in deciding this appeal are:

> **200 Court may suppress identity of defendant**
>
> (1) A court may make an order forbidding publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of, an offence.
>
> (2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—
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> (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
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> (b) cast suspicion on another person that may cause undue hardship to that person; or
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> (c) cause undue hardship to any victim of the offence; or
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> (d) create a real risk of prejudice to a fair trial; or
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> (e) endanger the safety of any person; or
>
> (f) lead to the identification of another person whose name is suppressed by order or by law; or
>
> (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
>
> (h) prejudice the security or defence of New Zealand.
>
> …

[2] For decision are these two questions:

(1) In interpreting s 200 of the Criminal Procedure Act, did the Employment Court err at [47]–[49] of its judgment, in holding that,

where an order forbidding publication of information has been made, it is not a "publication" to make disclosure of that information to that person's employer where the employer has a genuine interest in that information?[1]

(2) If the answer to question (1) is Yes, was it nonetheless open to the employer, the Vice-Chancellor of the University of Otago, to rely on and use information obtained contrary to the order?

[3] The Court granted the appellant leave to appeal those two questions in a judgment delivered on 15 April 2015.[2]

Background

[4] The appellant (ASG) was — and still is — a security officer employed by the respondent. The respondent is the Vice-Chancellor of the University of Otago (that is, its administrative head).

[5] In 2013, having pleaded guilty to one charge of wilful damage and another of assaulting a female, ASG appeared before Judge Flatley in the Dunedin District Court for sentencing.[3]

[6] In the course of his sentencing remarks, the Judge said this:

> [8] Considering those consequences, the most relevant for me is the potential that you would lose your job and I take the view that, given the type of employment you are in, there is an extremely strong likelihood that you would lose your job. You work for Campus Watch. That is a security-type role protecting students on campus as they move about and late at night and for an employee to have a conviction for assault would not be compatible and I accept the submission that Mr Turner has made and that is supported by the documents that have been filed that you are extremely likely to lose your job, as I have said.

[7] The Judge discharged ASG without conviction on both charges. That is a power the Judge had under ss 106 and 107 of the Sentencing Act 2002. The Judge

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1 *Hayne v ASG* [2014] NZEmpC 208 [EC judgment].
2 *ASG v Hayne* [2015] NZCA 115.
3 *New Zealand Police v [ASG]* DC Dunedin CRI-2013-012-184, 14 June 2013.

then made an order of "suppression of name and all details in relation to the defendant and this offending".[4]

[8] Amongst those sitting in the public gallery when ASG was sentenced was the Deputy Proctor of the University. He had been told ASG was being sentenced on criminal charges. That information had not come from ASG, who had not mentioned the matter to his employer (the respondent). The Deputy Proctor made notes during the sentencing.

[9] After the sentencing, the Deputy Proctor went to the criminal counter in the Court Registry and sought, from a member of the Registry staff, clarification as to the implications of the suppression order. He was advised he should seek legal advice. If he arranged advice through the University's Human Resources Manager, the Registry staff member suggested he should speak only in hypothetical terms. But, when he spoke to a lawyer, he could discuss the matter openly in order to obtain legal advice, because the lawyer was an officer of the court.

[10] The Deputy Proctor approached the University's Human Resources Manager, who referred him to the University's lawyer. The lawyer advised the Deputy Proctor that the Court's suppression order did not extend to the bare communication of information to genuinely interested people on a person-to-person basis. In the lawyer's view, an employer had a legitimate interest in the fact an employee had pleaded guilty to a serious charge relating to precisely the type of behaviour he is employed to prevent. Accordingly, the lawyer advised the Deputy Proctor he was able to discuss the charges against the employee and the way the Court had dealt with them with the appropriate human resources or management personnel in the University. That would enable the University to decide whether the charges impacted on the trust and confidence the University needed to have in the employee's ability to discharge his duties. Provided confidentiality was adhered to during any investigation, the communication of information between the "genuinely interested people" involved in the investigation would not breach the Court's suppression order.

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4 At [19].

[11] The Deputy Proctor then disclosed the appellant's name and details about the charges he had faced to the University's Human Resources Manager, to the Proctor and to ASG's immediate superior. These details were then passed on to the Vice-Chancellor, to an officer in the University's personnel section and to the Proctor's assistant. It is not ASG's case that these people had no genuine interest in receiving the information, but rather that disclosure to any of them breached the suppression order.

[12] ASG's job required him to deal with stressful situations in which he needed to exercise self control. It was considered the facts resulting in the charges were relevant to the question whether the University could continue to have trust and confidence that ASG would act appropriately in stressful situations.

[13] Accordingly, the University decided to commence an investigation. The judgment under appeal contains considerable detail about this investigation. To summarise:

(a) On 19 June 2013 the Deputy Proctor handed ASG a letter setting out the University's concerns. The letter suggested a meeting to discuss these concerns. It also proposed that ASG be suspended during the investigation, but invited his comment on that. The letter advised ASG that he was granted three days leave to take advice and must respond by 21 June.

(b) On 25 June the New Zealand Tertiary Education Union (the Union) wrote to the University on ASG's behalf. The Union's position was that the events leading to the charges were not relevant to ASG's work and that the proposed suspension would be unfair.

(c) On 26 June the University responded that ASG would remain suspended.

(d) Exchanges of correspondence and legal opinions followed. The Union took the view that the investigation involved the University

breaching the Court's suppression order. For that reason, it had advised ASG not to cooperate in the investigation.

(e) On 5 August the University provided a draft investigation report to ASG for his comment. The Union responded on 16 August reiterating its views, including that suspension or dismissal was inappropriate.

(f) After the Vice-Chancellor had reached the provisional view that a final written warning was appropriate, the University ended ASG's suspension and he returned to work on or about 3 October.

(g) The final written warning was contained in a letter dated 17 October. It was in respect of any conduct, whether or not in the workplace, that could reasonably be considered inappropriately violent or that could otherwise damage the trust and confidence the University needed to place in ASG's ability to respond appropriately in a confrontational situation.

[14] ASG raised two personal grievances with his employer, the Vice-Chancellor:

(a) He claimed his suspension constituted an unjustified disadvantage.

(b) He asserted that the final written warning the Vice-Chancellor had given him was a further disadvantage incurred in his employment.

[15] The Employment Relations Authority held ASG had not been disadvantaged unjustifiably by being suspended, but had been by being issued with a final written warning. The Authority reserved leave to apply for further directions as to remedies, should the parties be unable to agree.[5]

[16] Neither party was satisfied with the Authority's decision and both lodged challenges with the Employment Court.

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5 *B v Hayne* [2014] NZERA Christchurch 73.

[17] The Chief Judge of the Employment Court directed that the challenges be heard together in a de novo hearing that would reconsider all the issues.[6] The Chief Judge also directed that the hearing be by a Full Court because the case involved a non-publication order made by the District Court, and the situation, though not previously considered, was occurring more frequently in employment cases.[7]

Issue 1: Did the Employment Court err in interpreting s 200?

The Employment Court's judgment

[18] It is in these paragraphs of its judgment that Mr Cranney submits the Employment Court erred:

> [47] We turn to consider the application of s 195 [of the Criminal Procedure Act 2011] in an employment context. As already explained, this issue was touched on in cases that preceded the enactment of the Criminal Procedure Act, the most recent of which was *Solicitor-General v Smith*.[8] The Court considered that the term publication did not encompass the communication of information to "genuinely interested people".[9]
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> [48] Because of the special nature of an employment relationship which requires employers to have trust and confidence in their employees, we consider that the principle should apply by analogy to an employment situation, where an order is made under s 200 of the Criminal Procedure Act.
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> [49] An employer will have a genuine (i.e. legitimate and objectively justifiable) interest where there is a potential nexus between the circumstances relating to the charge or charges faced by the employee and the obligations of the employee to his/her employer.[10] An employer will not necessarily have that interest in all circumstances where a non-publication order is made.

[19] Those conclusions were reached after the Court had considered the relevance of employment factors to an application for discharge without conviction, had set out the relevant provisions in the Criminal Procedure Act, reviewed the previous case law, considered the Law Commission's report "Suppressing Names and Evidence"[11]

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6 *Hayne v ASG* [2014] NZEmpC 113 at [17].
7 See EC judgment, above n 1, at [8].
8 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) (footnote added).
9 At [62].
10 The concept of nexus was considered appropriate by the Court of Appeal when assessing whether an employee's misconduct outside the workplace impacted on his employment obligations: *Smith v The Christchurch Press Co Ltd* [2001] 1 NZLR 407 (CA) at [25]–[26].
11 Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009).

and considered also what was said in Parliament during the passage of the Criminal Procedure (Reform and Modernisation) Bill 2010 (243–1). We will come back to those matters.

Appellant's argument

[20] In submitting the Employment Court had erred in [47]–[49] of its judgment, Mr Cranney fastened his argument upon the High Court's judgment in *Director-General of Social Welfare v Christchurch Press Co Ltd*.[12] There, Panckhurst J was dealing with an application by *The Press* to discharge an interim injunction the Judge had granted on an ex parte application by the Director-General restraining *The Press* from publishing an article about a battle over the custody of an 11-year-old Christchurch boy.

[21] The issue was whether publication of the article would breach s 438 of the Children, Young Persons, and Their Families Act 1989, which provided:

> **438 Publication of reports of proceedings under Part 4**
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> (1) Subject to subsection (2) of this section, no person shall publish any report of proceedings under Part 4 except with the leave of the Court that heard the proceedings.
>
> (2) Nothing in subsection (1) of this section applies to the publication of—
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> (a) any report in any publication that—
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> (i) is of a bona fide professional or technical nature; and
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> (ii) is intended for circulation among members of the legal, medical, or teaching professions, officers of the Public Service, psychologists, counsellors carrying out duties under this Act, counsellors and mediators carrying out duties under the Care of Children Act 2004 or the Family Proceedings Act 1980, or social workers:
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> (b) statistical information relating to proceedings under this Act:
>
> (c) the results of any bona fide research relating to proceedings under this Act.

[12] *Director-General of Social Welfare v Christchurch Press Co Ltd* HC Christchurch CP31/98, 29 May 1998.

…

[22] After setting out s 438(1), Panckhurst J continued:[13]

> Subsection (2) then provides that the prohibition does not extend to the publication of any report in a bona fide professional context, to statistical information relating to proceedings, or to the results of bona fide research. In my view, when so read, the sense of subsection (1) becomes apparent. The focus is upon the publication of reports. I do not consider those words are apt to capture the bare communication of information to genuinely interested people, like social workers, foster parents and teachers, who *of necessity* must be given some information *on account of their involvement with a child* involved in the proceeding.

The emphasis is that placed by Mr Cranney in his submissions. Essentially, Mr Cranney argued that suppressed information could only be passed on in cases of necessity, and that there was no necessity here.

[23] Mr Cranney pointed out that the High Court in *Solicitor-General v Smith* had adopted Panckhurst J's interpretative approach.[14] In *Smith* the Solicitor applied for orders that three parties be fined for contempt of court, for publishing reports of a proceeding in breach of s 27A of the Guardianship Act 1968. Section 27A provided:

> **27A Restriction of publication of reports of proceedings**
>
> (1) No person shall publish any report of proceedings under this Act (other than criminal proceedings) except with the leave of the Court which heard the proceedings.
>
> …

[24] The Court in *Smith* noted Judges had disagreed as to the scope of the words "report of proceedings".[15] After referring to the view of Holland J in *Television New Zealand v Department of Social Welfare*,[16] the Court stated:

> [62] … Panckhurst J respectfully disagreed in *Director-General of Social Welfare v Christchurch Press Co Ltd* (High Court, Christchurch, CP 31/98, 29 May 1998). He regarded the phrase as covering the reporting of the initiation of a case and of all stages of it. He did not consider that the difficulties presented to him, and raised again by Mr Upton in this case, as to the communication of information about a custody case to genuinely interested people, for example social workers and teachers, arose, even on

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13 At 10.
14 *Solicitor-General v Smith*, above n 8.
15 At [62].
16 *Television New Zealand v Department of Social Welfare* [1990] NZFLR 150 (HC).

> that wider interpretation of s 27A. We respectfully agree with and adopt Panckhurst J's approach. As he pointed out, s 27A focuses upon the publication of reports, and its wording is not "apt to capture the bare communication of information to genuinely interested people".

[25] The *Christchurch Press* and *Smith* cases were two of several the Employment Court cited to illustrate the different interpretations of the term "publication" Courts had adopted in a variety of situations and statutory contexts.

[26] Mr Cranney was critical of the Employment Court, in [47] of its judgment, for adopting the phrase "genuinely interested people" without considering the phrase's full context in *Christchurch Press* or *Smith*. Having plucked the phrase "genuinely interested people" out of its context and misstated the approach in those two cases, Mr Cranney submitted the Employment Court had then magnified its error by applying that incorrect approach "by analogy" to all employment relationships because they were special relationships involving "trust and confidence".

[27] Referring to [49]–[50] of the Employment Court's judgment, Mr Cranney submitted this contemplated:

(a) The public gallery observer or other potential publisher making a judgement call as to whether the recipient of their publication is in a special relationship or a relationship of trust and confidence with the defendant. If so, they may lawfully ignore the court's suppression order.

(b) An after-the-fact remedy where there has been publication to an employer who lacks the necessary genuine interest: if called upon, the employer will have to justify to the Employment Relations Authority or Employment Court its genuine interest when establishing that it acted as a fair and reasonable employer.

[28] In Mr Cranney's submission, this reasoning was wrong. A suppression order made by the court under s 200 must be respected and cannot be breached on the basis that the defendant, who is the beneficiary of the order, is in a special

relationship or a relationship of trust and confidence with the person to whom the publication is made. Accordingly, Mr Cranney submitted this first question should be answered 'yes'.

Our view

[29] As the Judge noted in his sentencing remarks set out in [6] above, protecting students on campus, particularly as they moved about late at night, was part of ASG's role as a security officer. So was protection of the University's property and that of students.

[30] Section 4 of the Employment Relations Act 2000, which was extensively amended in 2004, requires parties to an employment relationship to deal with each other in good faith.[17] Neither must do anything to mislead or deceive the other, or that is likely to mislead or deceive the other.[18] Section 4(1A) provides:

> (1A) The duty of good faith in subsection (1)—
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> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
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> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; …
>
> …

[31] When we pressed Mr Cranney about this, he accepted ASG "could have had" a duty to disclose his offending to the University. Mr Cranney felt unable to concede this point, because he did not know the full circumstances of the offending.

[32] We are in no doubt that the duty of good faith s 4 imposed on ASG required him to disclose the charges he faced to the University as his employer. Had he done so, the whole of this proceeding (the hearings before the Authority and the Employment Court, and this appeal) would have been unnecessary.

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17 Section 4(1)(a).
18 Section 4(1)(b).

[33] In [50] and [51] below we make some comments and offer some suggestions to judges framing a s 200 order when the offending might impact on the defendant's employment.

[34] Given ASG's breach of his s 4 duty of good faith to the University, what could the Deputy Proctor properly do? First, we consider it would never be a breach of a s 200(1) order for a person to "publish" a suppressed name or details by way of mentioning them to a legal adviser[19] in order to obtain legal advice about a s 200 order a court has made. That is because such a "publication" is a privileged communication under s 54 of the Evidence Act 2006. All the policy reasons behind s 54 are also reasons for excepting such a "publication" from the scope of a s 200(1) order.[20]

[35] Secondly, the Deputy Proctor could disclose to the Vice-Chancellor (or to her deputy) the fact ASG had pleaded guilty to charges of wilful damage and assaulting a female. That communication was essentially a proxy for ASG's failure to inform the University about that himself. It was required so that the Vice-Chancellor could consider whether to commence an investigation.

[36] If the Vice-Chancellor decided an investigation was required, we consider she should have applied to the District Court under s 208(3) of the Criminal Procedure Act to vary the suppression order to permit publication to and between responsible staff in the University for the purposes of the investigation.

[37] The Vice-Chancellor did not do that, but, as the Employment Court observed:[21]

> the Deputy Proctor disclosed the information he had heard while in Court to a small number of persons within the University all of whom had a genuine interest in receiving it, given its potential relevance to its employment relationship with ASG.

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19 As defined in s 51(1) of the Evidence Act 2006.

20 The Evidence Act does not alter the general law of legal professional privilege that protects against disclosure in all circumstances: s 53(5). The purpose of that law is to promote open and honest communication with legal advisers, thereby facilitating access to and proper administration of justice. Individuals unsure about the effect of a s 200 order should be encouraged to seek advice from a lawyer in order to ensure they do not breach its terms.

21 EC judgment, above n 1, at [59].

[38] We agree with the Employment Court's conclusion that "in the circumstances the disclosure did not amount to a prohibited publication" for the following reasons.[22]

[39] First, the legislative background. The Law Commission considered whether "publication" should be defined in the new legislation. In its Issues Paper, it said:[23]

> 8.32 In our view, as a matter of policy the provisions ought to include word of mouth communication. This is consistent with the meaning of publication in a defamation context, where a statement is "published" if it is communicated to a third party. While publication of suppressed information by way of broadcast, print publication or placement on the Internet breaches an order on a wide scale, widespread gossip can also undermine a suppression order. Nor does the word of mouth communication need to be widespread to render a suppression order pointless in some cases. For example, one can imagine situations in which breaching a suppression order by telling just one person may cause substantial damage, for example where an accused wishes to avoid an employer learning about pending charges.
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> 8.33 Should the legislation define more clearly what publication means? There are two competing interests to be considered in this regard, clarity and flexibility. Providing a statutory definition has the advantage of legal clarity and certainty. If publication is explicitly defined, for the reasons set out above in our view it would be inappropriate to exclude one-to-one communication from the definition. However, including one-to-one communication potentially extends the ambit of the offence much too far. Technically a person would be in breach of an order if they were present in court, heard the name of a defendant, which was suppressed, and told their own spouse, but no one else. Putting aside questions of proof and enforcement, is it the intention of the legislature that this conduct should breach a suppression order? To avoid the law being brought into disrepute, the system would be reliant on police deciding not to prosecute trivial breaches, or the courts discharging without conviction.
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> 8.34 The alternative is to avoid providing a statutory definition of "publication" and leave it to the courts to make decisions on a case by case basis, and to take a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act. This has the advantage of reducing the risk of people being charged and/or convicted (even if discharged) with trivial breaches of suppression orders. The disadvantage is that there will continue to be a degree of uncertainty about the precise meaning of publication.

[40] In its report it noted submitters had been divided "as to whether a statutory definition should be included, and equally divided as to whether such a definition

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22 At [59].

23 Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008).

should include passing information by word of mouth".[24] It did not recommend including a statutory definition in the new legislation because:[25]

> in our view it may create more problems than it solves. It would be preferable to leave it to the courts to make decisions on a case by case basis, taking a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act.

[41] The Commission's recommendations were adopted in the Criminal Procedure (Reform and Modernisation) Bill. In the explanatory note, the following points were made regarding the meaning of "publication":[26]

> *Clause 199*[27] describes the context in which publication will breach a suppression provision or a suppression order. It provides that **publication** means publications in the context of any report or account relating to the proceeding in respect of which the suppression provision or order applies. This is not intended to be a definition of the terms **publication** or **publish,** as it is considered preferable that the meaning of these terms continue to be developed at common law rather than specified in the legislation. Instead the clause is designed to clarify that publication of a person's name is not prohibited in any context that is unrelated to a report or account of the criminal proceedings. Phrases along the lines of "may not publish, in any report or account relating to any proceedings in respect of an offence," are used in a number of places in those sections of the Criminal Justice Act that relate to name suppression. *Clause 199* is a device designed to avoid the need to repeatedly use this phrase in the following clauses that prohibit the publication of particular details.

[42] This legislative history demonstrates that the meaning of publication is flexible and depends on the circumstances.

[43] Second, the case law. In the judgment under appeal, the Employment Court cited several cases that held the word "publish" means publication to the world at large,[28] or putting material "in a public arena".[29] That is not to say that word-of-mouth communications or communications to one or very few other persons cannot amount to publication. But what emerges from these few relevant cases is that "publication" refers to dissemination to the public at large rather than to persons with a genuine interest in conveying or receiving the information. Although he

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24 Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at [7.17].
25 At [7.18].
26 Criminal Procedure (Reform and Modernisation) Bill 2010 (243–1) (explanatory note) at 56.
27 Clause 199 is equivalent to s 195 as enacted: "Context in which publication prohibited".
28 EC judgment, above n 1, at [39], citing *Slater v Police* HC Auckland CRI-2010-404-379, 10 May 2011; and *Re Baird* [1994] 2 NZLR 463 (HC).
29 At [43], citing *Solicitor-General v Smith*, above n 8.

accepted there must be a "genuine interest" exception to the prohibition on publication, Mr Cranney submitted this must be limited to cases of necessity.[30] He referred also to s 209 of the Criminal Procedure Act, which provides that information may be passed on to the police and certain persons involved in the justice process even where publication of it is prohibited. We do not accept the exception is so limited; it extends to permitting the passing on of information to persons who either need to know or have a genuine interest in knowing. And, here, the University *did* need to know about ASG's offending in order to investigate properly his continuing ability to perform his role and in order to fulfil its obligations to its other employees and to its students. We expand on this at [48]–[49] below.

[44] Third, the situation here. Our view is that s 200 was not intended to apply to the circumstances of this case. In referring to "the circumstances", we specifically include the fact ASG breached his s 4 duty of good faith by failing to inform his employer of his offending. In *Smith v The Christchurch Press Co Ltd*, this Court explained that there are recognised cases in which an employer has a legitimate interest in employees' conduct outside the workplace, namely those where there is a clear relationship between the conduct and the employment.[31] Whether the conduct occurs outside work is relevant. But more important is whether the conduct is incompatible with the proper discharge of the employee's duties or whether, for any other reason, it undermines the trust and confidence necessary between employer and employee.[32]

[45] Conduct involving violence and intentional property damage was obviously relevant to ASG's employment as one of the University's security officers. It raised the question: was ASG able properly to discharge his duties of keeping staff and students, their property and that of the University safe? It could legitimately undermine the University's confidence in his ability to do so. We say "legitimately", because it is important to distinguish cases where an employer uses the fact of some

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30 This was a reference to the statement in *Christchurch Press* that information that had been suppressed under the Children, Young Persons, and their Families Act 1989 could be communicated to persons who "of necessity must be given some information on account of their involvement with a child involved in the proceeding": *Director-General of Social Welfare v Christchurch Press*, above n 12, at 10.

31 *Smith v The Christchurch Press Co Ltd*, above n 10, at [21]–[25].

32 At [25].

undesirable conduct unrelated to the employee's responsibilities as an excuse for avoiding its obligations under the Employment Relations Act. Nothing in the material before us suggests Parliament intended s 200 to prevent disclosure to an employer in a case such as this one, where the employee's conduct raises obvious and legitimate concerns about his ability to do his job satisfactorily.

[46] Although not accepted by the Employment Court, we think Mr Cranney was correct to submit "that in this instance the University was the very organisation to which the non-publication order was directed".[33] Although we cannot be certain, we think the Judge discharged ASG without conviction and then suppressed publication of his name primarily to protect ASG from the University and the possible loss of his job there. Indeed, the Judge obviously thought it inevitable that ASG would lose his job if his name was published.

[47] We consider that is a faulty basis for a s 200 order. The problem with that approach is well stated in this passage in the Employment Court's judgment:

> [30] But a court considering the exercise of [the discretion to discharge without conviction] is usually only undertaking a risk assessment as to the consequences of a conviction on the person's existing or future employment. Often, the Court will be carrying out that assessment without hearing from the employer. …

[48] The Employment Court amplified why it held that view in the following two paragraphs:

> [57] ASG's employment agreement contained health and safety provisions which required the University to encourage safe work practices. Appendix B to the agreement identified certain personnel provisions arising from s 77A of the State Sector Act 1988. These included recognition of good employer responsibilities, including the provision of good and safe working conditions, and the requirement that all employees would maintain proper standards of integrity, conduct and concern with regard to the wellbeing of students attending the institution. ASG's job description emphasised these responsibilities in its statements of objectives and key tasks. As a matter of law, the University also had statutory obligations to take all practicable steps to ensure safety of employees and others under the Health and Safety in Employment Act 1992.
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> [58] The Court accepts the submission made by Mr Harrison that the University had a duty and an entitlement as an employer to investigate and,

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[33] EC judgment, above n 1, at [56].

> if need be, take action to address potential health and safety and related concerns arising in respect of one of its employees. ASG came to the attention of the police because he was violent to his partner and damaged property. We are satisfied that the University had a genuine interest in the subject matter of the offences having regard to ASG's work responsibilities.

[49] Had the Judge heard from the University and taken account of the University's responsibilities under the State Sector Act 1988 and the Health and Safety in Employment Act 1992,[34] we think the Judge would have crafted his order to permit publication of ASG's name to and between responsible staff in the University.

[50] That leads us to urge District Court judges, when framing an order under s 200(1), to be alive to the statutory obligations on employers, and to the Employment Court's view, which we share:[35]

> Ultimately, any decision about the consequences for employment of a prosecution with or without conviction of an employee will be for that person's employer.

[51] We are very conscious that District Court Judges are routinely handling long case lists. But, where a s 200(1) order may affect the defendant's employment, time taken to stipulate clearly what may be published to an employer and between an employer's responsible staff will avoid uncertainty and any need for the employer to seek a variation under s 208(3) of the Criminal Procedure Act.

[52] For all those reasons, we answer Issue 1: "No".

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[34] For example, s 77A(3) of the State Sector Act 1988 requires the University to ensure that all employees maintain proper standards of integrity, conduct, and concern for the public interest and the well-being of students; and s 6 of the Health and Safety in Employment Act 1992 as in force at the relevant time required the University to take all practicable steps to ensure the safety of employees, while s 15 required it to take all practicable steps to ensure no action or inaction of any employee while at work harms any other person. An employer's obligations under the latter Act were significantly toughened on 4 April 2016 when the Act was replaced by the Health and Safety at Work Act 2015, in particular see ss 36–37 and 44.

[35] EC judgment, above n 1, at [30].

Issue 2: If the Employment Court did err, was it nevertheless open to the employer to use the information it obtained contrary to the Court's suppression order?

[53] Given our "No" answer to the first issue, we are not required to answer this second question.

[54] However, we do reiterate our suggestion that when an employer has doubts as to whether its proposed use of information about an employee breaches a s 200 court order, it should apply to the court under s 208(3) for a variation of the order.

Result

[55] The appeal is dismissed. We answer the questions as follows:

(1) Question: Did the Employment Court err in its judgment at [47]–[49] in its interpretation of s 200 of the Criminal Procedure Act 2011 in holding that, where an order forbidding publication of information has been made, it is not a "publication" to make disclosure of that information to that person's employer where the employer has a genuine interest in that information?

Answer: No.

(2) Question: If the answer to question 1 is Yes, was it nonetheless open to the employer, the Vice-Chancellor of the University of Otago, to rely on and use information obtained contrary to the order?

Answer: None required.

[56] The appellant must pay the respondent's costs for a standard appeal on a band A basis plus usual disbursements.

Solicitors:
Oakley Moran, Wellington for Appellant
Anderson Lloyd, Dunedin for Respondent